IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRIMINAL APPEAL NO.1002 SB OF 1998

DATE OF DECISION: MAY ,2007

Balwinder @ Billu

.....Appellant

VERSUS

State of Haryana

....Respondent

CRIMINAL APPEAL Nos.29 AND 273 SB OF 1999

Subhash

.....Appellant

VERSUS

State of Haryana

....Respondent

CORAM:- HON'BLE MR.JUSTICE RANJIT SINGH

1. **Whether Reporters of local papers may be allowed to see the judgement?**
2. **To be referred to the Reporters or not?**
3. **Whether the judgment should be reported in the Digest?**

PRESENT: Mr. Sanjiv Gupta, Advocate,
for the appellants.

Mr. Yashwinder Singh, AAG, Haryana,
for the State.

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RANJIT SINGH, J.

The aforesaid appeals are filed by Balwinder @ Billu and Subhash,

who are convicted under Section 376 (2) (g) IPC for gang rape and sentenced to suffer rigorous imprisonment for 10 years each with a fine of Rs.5000/-. In default of payment of fine, they are to undergo sentence of rigorous imprisonment for six months. Two out of the three appeals are filed by appellant Subhash, one through jail and another through a counsel. The third appeal No.1002 SB of 1998 is filed by appellant Balwinder @ Billu. All the three appeals are being disposed of by this common order.

The facts, in brief, are that prosecutrix (name with-held), a daughter of a poor rickshaw puller, whose mother was running a tea shop, complains of being subjected to forcible rape. As stated by her, she used to be alone at her house. 5-6 days prior to 14.7.1997, the prosecutrix was alone at her house at about 1 P.M., when her neighbourer Smt.Kalia took her to Mahavir Colony situated beyond railway crossing. As disclosed, Smt.Kalia used to reside in the colony previously. Smt.Kalia, however, started talking to someone else and so the prosecutrix commenced her return journey. Enroute, she found appellant Subhash son of Smt.Kalia and appellant Balwinder @ Billu standing in front of a house. Appellant Subhash told the prosecutrix that they used to reside in this house and asked her to see and she proceeded to do so. The moment she entered the house, appellant Balwinder caught hold of her and appellant Subhash closed the door of the house from outside. The prosecutrix has disclosed that appellant Balwinder gagged her mouth with a piece of cloth and then committed rape upon her against her will by forcibly breaking the string of her salwar. She raised alarm by taking out the clothes from her mouth but both the appellants succeeded in

running away from the spot, when they found one Krishan Lal coming towards the house on hearing her shouts. She narrated the occurrence to her mother after initial reluctance due to shame. Later, she accompanied by her father, Hira Lal, went to police station to file a complaint, which was accordingly lodged. The prosecution, conviction and sentence followed. The appellants have filed the present appeals against their conviction and the award of the sentence.

Appellant Balwinder Singh, while claiming to be innocent, pleaded that he was falsely implicated due to the fact that he was to pay a sum of Rs.500/- to Smt.Kanchan, mother of the prosecutrix, as he used to have tea on credit from the tea shop being run by her. She demanded money from appellant, Balwinder and on his refusal to pay the said amount, he was falsely implicated in this case. On the other hand, appellant Subhash simply pleaded his false implication. One Ashok Kumar was examined in support of their stand by the defence that appellant Balwinder used to have tea from the shop run by Smt.Kanchan. Defence also examined Dr.Sham Wadhwa as DW2, who had conducted the ossification test of the prosecutrix and found that she was aged between 15-1/2 to 17 years. She further deposed that there could be variation of the age by 2 years on either side, which cannot be ruled out.

I have heard learned counsel appearing for the parties.

Mr.Sanjeev Gupta, appearing for the appellants, has mainly focussed his submission in regard to the age of the prosecutrix, which according to him, as per evidence, was more than 16 years. His submission, though advanced in guarded manner

appears to be that it is a case of consent and hence, his emphasis to show the age of the prosecutrix to be more than 16 years. He would also refer to the medical evidence, showing that prosecutrix was found to be habitual of sexual intercourse. According to him, this aspect, when seen in the background that no injury was found on any part of her body, it may appears to be a case of consent.

This plea, though raised before the trial Court as well, runs contrary to the stand taken by the appellants in his defence, as already noticed above. The appellants have raised a plea of their false implication for the reasons as noticed. Though they may not be bound in this regard and can plead this to be a case of consent, yet they would do so and run the risk of their defence being put to minute scrutiny . The prosecution case is supported by the prosecutrix, who has given a clear and categorical evidence of her being subjected to forcible intercourse. Her version is supported by her mother, Kanchan and has received further corroboration from the medical evidence. Though as per the F.S.L. Report, no semens were detected on the slides prepared but it would not be of much significance as the complaint in this case was lodged after 5 days due to which, her medical examination was held after a few days of the incident. This delay otherwise was sufficiently explained. The case of the appellants that they were falsely implicated and plea of consent raised in the alternative, would not find any support from the evidence or the circumstances on record. The prosecution case is well supported by the evidence of the prosecutrix. The learned counsel appearing for the appellants could not point out any fact or circumstance, which would go to cast doubt on the version given by

the prosecutrix. As is rightly noticed by the trial Court, the testimony of the prosecutrix cannot be equated with that of the accomplice to look for any corroboration. In sexual assault cases, there is no requirement either under law or otherwise to doubt the evidence given by the victim herself. Reference in this regard can be placed on the law laid down in ***State of Maharashtra Vs. Chander Parkash Kewal Chand Jain,*** 1990 (1) RCR 411. It is rightly observed in this case that the prosecutrix is a victim in such a crime and there is no requirement under the Indian Evidence Act that her evidence cannot be accepted unless it is corroborated in material particulars. Even otherwise, the evidence of the prosecutrix finds sufficient support from the deposition of her mother and also the medical evidence. PW5 Dr.(Mrs.) Amarjit Wadhwa, who had examined the prosecutrix, clearly opined that possibility of her being subjected to sexual activity prior to her examination could not be ruled out. It is on record that prosecutrix was married but had hardly stayed in her matrimonial house for few days and thereafter she was staying with her parents only. In this background, the evidence of sexual intercourse/sexual activity would clearly indicate and stand in support of her version that she was subjected to sexual intercourse. The reasons advanced by appellant Balwinder to plead his false implication are too puerile for acceptance. No person, with reasonable senses, can be expected to involve the honour of her daughter to make an allegation of rape on account of the fact that a person owed a sum of Rs.500/- to her and it was not being paid. There is sufficient material and circumstances as well as evidence on record to corroborate the version of the prosecutrix. Nothing has been pointed out to show that

she is not a trustworthy and reliable. The delay of 5-6 days in lodging the FIR, as highlighted by counsel for the appellants, in my view, has sufficiently been explained. It is brought out by the prosecution that a complaint was lodged with Police Station, Karnal, on the same day but still, the prosecutrix had to visit the Police Station every day for about 5-6 days before the action followed on their complaint that too after approaching Superintendent of Police, Karnal. It is rightly observed by the trial Court that delay in lodging the FIR was sufficiently explained and cannot be said to be fatal to the prosecution in any manner. No other point is urged on behalf of counsel for the appellants.

I am of the considered view that prosecution has succeeded in proving the case beyond reasonable doubt and there is no merit in the appeals and the same deserves to be dismissed.

Coming to the question of sentence, counsel for the appellants points out that both the appellants were aged about 19 years at the time of incident and have already undergone sentence of about four and a half years. Counsel would also point out that incident is of the year 1997 and the present appeal is pending since the year 1998. The appellants, as such, faced prolonged prosecution and have undergone substantial portion of the sentence. Counsel would refer to the case of ***Karamvir Vs. State of Haryana,*** 2003 (3) Criminal Court Cases 390 (P&H) to say that though the minimum sentence of 10 years is prescribed for the offence under Section 376 (2)(g), yet sentence less than minimum was imposed under special circumstances and, thus, there is no rigidity in this regard. In this case, sentence of 4 years was awarded by way of mercy for the

reason that the incident was 14 years old and the appellant was having 3 minor children of tender age and widowed mother to look after. He has also referred to the case of ***Narender Singh Vs. State of Haryana,*** 2003 (3) Criminal Court Cases 517 (P&H), where sentence was reduced to period already undergone on the ground that the accused in the said case had faced trial for 14 years. The ratio laid down in this case may not apply to the facts of the present case as this was a case of attempt to rape where prosecutrix and both accused were found to have married and settled in their matrimonial home. To seek further support to his plea for reducing the sentence, though minimum is prescribed, the counsel has referred to ***Sunder Vs. State of Haryana,*** 2005 (4) Criminal Court Cases 222 (P&H), ***Keshar Singh Vs. State of Haryana,*** 2005 (4) Criminal Court Cases 269 (P&H), ***Sadhu Singh Vs. State of Punjab,*** 1998 (4) RCR (Criminal) 232 and ***Kuldip Singh and another Vs. State of Punjab,*** 2003 Cri.L.J. 3777. In these cases, the sentences have been directed to be reduced, after convicting for an offence under Section 376 IPC, mainly on the ground that the incident was very old ranging from 14 to 16 years. Most of the cases are not of a gang rape. In Kuldeep Singh's case (supra), this Court up-held the sentence of 4 years rigorous imprisonment as was awarded by the Court, even after up-holding the conviction under Section 376 (2)(g) IPC for gang rape. In this case, this Court did not feel inclined to disturb the sentence imposed by the trial Court, which had done so by noticing the young age of the accused-appellants and the fact that the case was pending for a considerable long time.

In this case, though the conviction of the appellants for an offence under Section 376 (2)(g) IPC for a gang rape is being maintained, yet it may need a notice that one of the appellant, namely, Subhash, had not participated in sexual assault of the prosecutrix but had only acted in helping the co-accused. Both the appellants were of rather young age at the time of commission of offence. Though they were/are not entitled to claim the benefit of the Probation of Offenders Act yet, keeping in view the fact that they have undergone a substantial portion of rigorous imprisonment and have remained under a constant threat of sentence starring at them for a considerable period of time ever-since the year 1998, some interference in the sentence may be called for. Sentence awarded to appellant Subhash is reduced to a period already undergone. Case of Balwinder Singh, however, is differently placed and can not be equated with appellant Subhash. Still, keeping his young age in view and that he has faced a prolonged prosecution, the sentence awarded to him is reduced to 7 years rigorous imprisonment. The sentence of fine, as awarded to the appellants, shall remain.

With this modification, in the sentence all the three appeals are dismissed. Appellant, Balwinder @ Billu would surrender before the Chief Judicial Magistrate, Karnal, to undergo the remaining portion of his sentence. However, the bail bonds/surety bonds of appellant, Subhash would stand discharged.

May , 2007 **(RANJIT SINGH)**
khurmi **JUDGE**